Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1200

In the Supreme Court of the United States

OCTOBER TERM, 1988

ERNEST P. LAMPERT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether government press releases describing tax law enforcement actions taken in public judicial proceedings constitute unauthorized disclosures of tax return information in violation of Section 6103 of the Internal Revenue Code.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 854 F.2d 335. The opinion of the district court in *Lampert* v. *United States* (Pet. App. C1-C22) is unofficially reported at 87-1 U.S.T.C. (CCH) ¶ 9361. The opinions of the district court in *Peinado* v. *United States* (Pet. App. D1-D5) and *Figur* v. *United States* (Pet. App. E1-E14) are reported at 669 F. Supp. 953 and 662 F. Supp. 515, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988. A petition for rehearing was denied on October 21, 1988 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on January 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The decision below was rendered on consolidated appeals from three different cases brought in the United States District Court for the Northern District of California. Each case involves a suit against the United States seeking damages under Section 7431 of the Internal Revenue Code, on the ground that government officials unlawfully disclosed tax return information in violation of Section 6103 of the Code.[1] In each instance, the alleged wrongful disclosure involved the issuance of a press release by government officials in connection with a public court proceeding.

a. Petitioners Ernest Lampert, Delphine Lampert, Robert Burns, and John Thorne were officers, employees, and owners of United Energy Corporation. The United States brought a civil action against them (and related corporations) to enjoin the promotion and sale of an abusive tax shelter. On June 3, 1986, the day that the complaint was filed, the United States Attorney's office and the Internal Revenue Service issued separate press releases announcing the filing of the lawsuit and the investigation of petitioners. Petitioners then brought an action under Sec-

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.). Section 7431(a)(1) of the Code provides as follows:

> **Disclosure by employee of United States –**
>
> If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

Section 7431(b) provides that there shall be no liability in the case of a "disclosure which results from a good faith, but erroneous, interpretation of section 6103." Section 7431(c) authorizes a damage recovery of costs, actual damages, punitive damages in the case of willful or grossly negligent disclosures, and a minimum damage award of $1,000 for each act of unauthorized disclosure.

tion 7431, alleging that the press releases constituted disclosure of their return information under Section 6103, and seeking monetary damages against the United States. See Pet. App. C2. The district court granted summary judgment in favor of the government (*id.* at C1-C22). The court assumed arguendo that the press release was an unlawful disclosure (*id.* at C10), but held that, in any event, the government was protected from liability by Section 7431(b) because its decision to issue the press releases was based on a good faith interpretation of Section 6103 (Pet. App. C10-C21).

b. Petitioner Peinado was indicted on two counts of tax evasion and two counts of willfully subscribing to a false income tax return. His trial ended in a mistrial. During a subsequent hearing in court he pleaded guilty to two counts of tax evasion as charged in the indictment, and he was sentenced at a later court hearing. The United States Attorney's office on January 27, 1986, issued a press release announcing the guilty plea, and it issued a second press release on March 3, 1986, reporting the sentence. Pet. App. D2. Petitioner brought an action for damages under Section 7431. The district court granted the government's motion for summary judgment, determining that no violation of Section 6103 had occurred (Pet. App. D1-D5). Concluding that "[i]t was not the intent of Congress in enacting section 6103 to penalize the government for issuing a press release repeating information that is already a matter of public record," the court held that "[a] press release that simply announces or broadcasts what is already known from court proceedings is not a disclosure as that term is defined in section 6103" (*id.* at D4). The district court further found that the government had "acted in good faith" in issuing the press release (*id.* at D4-D5).

c. Petitioner Figur was charged with conspiracy to defraud the United States and with income tax evasion,

and he pleaded guilty to both counts. On the same day, the United States Attorney's office issued a press release summarizing the charges against Figur that were contained in the criminal information (Pet. App. E1-E2). Petitioner Figur subsequently brought an action for damages under Section 7431. The district court granted summary judgment in favor of the United States (Pet. App. E1-E14). The court held that "Section 6103 does not prevent [the government] from issuing a press release reporting return information contained in the public record" (*id.* at E7), explaining that "[t]he act of 'disclosure' presupposes confidentiality or at least limited access to the material revealed" (*id.* at E8).

2. The court of appeals affirmed the district court judgments in all three cases in a consolidated opinion (Pet. App. A1-A8). The court noted that petitioners "admit that anyone is free to obtain return information from public court records," yet "insist that for a government employee to disclose any return information, confidential or not, there must exist an applicable exception to section 6103(a)" (*id.* at A7). The court characterized this contention as based upon "a strict, technical reading of the statute" that would "defeat the purposes of the statute," and it stated that "Congress sought to prohibit only the disclosure of confidential tax return information" (*id.* at A8). Accordingly, the court concluded that "once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate [Section 6103]" (*ibid.*).

ARGUMENT

The court of appeals correctly held that press releases by governmental officials that report information disclosed in public judicial proceedings do not violate Section 6103

of the Code. Its decision does not conflict with any decision of another court of appeals or of this Court. Accordingly, it does not warrant further review.

1. Section 6103 of the Code "lays down a general rule that 'returns' and 'return information' as defined therein shall be confidential." *Church of Scientology of California* v. *Internal Revenue Service,* No. 86-472 (Nov. 10, 1987), slip op. 1; see I.R.C. § 6103(a). The statute implements this rule through a comprehensive scheme governing the circumstances under which the Internal Revenue Service (IRS) is permitted to disclose return information to other governmental agencies and nongovernmental parties. This scheme generally "represents a legislative balancing of the right of taxpayers to the privacy of tax information in the hands of the IRS and the legitimate needs of others for access to that information." *Stokwitz* v. *United States,* 831 F.2d 893, 895 (9th Cir. 1987), cert. denied, No. 87-1291 (May 2, 1988); see also *Chamberlain* v. *Kurtz,* 589 F.2d 827, 835 (5th Cir.), cert. denied, 444 U.S. 842 (1979).

One of the circumstances in which the disclosure of returns and return information is specifically authorized is for use "in a Federal or State judicial or administrative proceeding pertaining to tax administration * * * [where] the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal [tax] liability" (I.R.C. § 6103(h)(4)). All of the tax return information set forth in the press releases in this case was lawfully disclosed under this section in federal court proceedings involving petitioners' civil or criminal tax liabilities. See Pet. App. A5-A6 n.1. It is well established that what transpires in open court is a matter of public record (*Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 597 (1978)), and that "[t]hose who see and hear what transpired can

report it with impunity" (*Craig* v. *Harney,* 331 U.S. 367, 374 (1947)). Thus, it is clear that the return information whose disclosure in the press releases forms the basis for petitioners' claims had already been lawfully disclosed by the government to the public.

It is manifest that nothing in Section 6103 disables members of the public, including the news media, from disseminating return information once it has been disclosed in a judicial or administrative proceeding. Thus, petitioners' argument is that Congress intended to impose upon government officials a unique restriction forbidding them from further disclosing return information that has already been made public and that may freely be reported in the press or otherwise publicized by anyone other than government officials. There is no reason to ascribe to Congress such a peculiar intent. The purposes of a statute designed to preserve the confidentiality of taxpayer information required to be furnished to the IRS plainly are not furthered by preventing government officials from relating such information after it has already been made public. As one district court stated in rejecting a contention similar to that advanced by petitioners, "[o]nce tax return information enters the public domain, the taxpayer no longer has any privacy interests in that information." *Thomas* v. *United States,* 671 F. Supp. 15, 16 (E.D. Wis. 1987), appeal pending, No. 88-1336 (7th Cir.).

Indeed, Section 6103(p)(4), which establishes a detailed set of safeguards and recordkeeping requirements to ensure that government agencies receiving information from the IRS pursuant to the provisions of Section 6103 do not make further disclosures, strongly indicates that Congress did not intend to restrict government officials from reporting return information that has already been made public in judicial or administrative proceedings. Section

6103(p)(4) expressly provides that the restrictions it imposes "shall cease to apply with respect to any return or return information if, and to the extent that, such return or return information is disclosed in the course of any judicial or administrative proceeding and made a part of the public record thereof." Among the restrictions that cease to apply under this clause is the requirement that the agency "restrict * * * access to the returns or return information only to persons whose duties or responsibilities require access and to whom disclosure may be made under the provisions of this title" (§ 6103(p)(4)(C)). It is highly implausible that Congress intended to impose Section 7431 damage liability upon the United States for disclosures made by government officials in circumstances where Congress specifically provided that the restriction on agency dissemination of the information "shall cease to apply."[2] Moreover, government press releases, which serve the important purpose of informing the public and potential violators that the tax laws are being vigorously enforced, are not a recent innovation. It is therefore reasonable to believe that Congress would have been more

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[2] This conclusion is no less applicable to disclosures made by employees of the IRS itself, though Section 6103(p)(4) by its terms addresses only the restrictions on disclosure by government agencies to which the IRS has disclosed return information. Section 6103(p)(4), which prohibits the IRS from furnishing return information to an agency unless the appropriate safeguards are in place, is clearly designed to guarantee that the confidentiality of the information in the hands of the IRS is not diminished at all when it is furnished to the agency (apart from the authorized disclosure to the agency itself). See S. Rep. No. 938, 94th Cong., 2d Sess. 345 (1976). Accordingly, if Congress had intended that the IRS be prohibited from disseminating return information even after it had been lawfully introduced into the public domain pursuant to Section 6103(h)(4), it surely would not have explicitly removed the restriction upon such disclosures by other agencies that is contained in Section 6103(p)(4).

explicit if it had intended to bar government officials from providing the news media with public information pertaining to tax law enforcement actions—a prohibition that would not serve the taxpayer privacy policy interest that underlies Section 6103.

Petitioners' attempt to enforce a duty of "confidentiality" on government officials with respect to tax information disclosed in judicial and administrative proceedings and contained in public court records would produce absurd results. Under petitioners' interpretation of the statute, tax return information—no matter how public—can never be reported by government officials except under the circumstances for which Section 6103 permits disclosure of truly confidential material. Thus, government officials generally could not discuss the facts of published tax decisions or a front page newspaper story reporting the fact of a tax investigation, even though the published material could freely be obtained, used, and disseminated by anyone else. It is manifest that Congress did not intend such a senseless restriction, and nothing in Section 6103 requires its imposition.[3]

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[3] There is no merit to petitioners' contention (Pet. 12-13, 24-26) that the court of appeals' decision permits government officials to disclose virtually anything contained in IRS files, since much of the information in those files may be available from other individuals or public records, such as recorded liens or real estate transactions. The statutory definition of "return information" encompasses any information, public or private, furnished to or collected by the IRS with respect to a taxpayer's tax liability. See I.R.C. § 6103(b)(2). It is the status of the information as part of an IRS file and its disclosure from that file that implicate Section 6103, regardless of whether some of the information may be available from another source. See *Stokwitz* v. *United States, supra.* But once that return information lawfully has been removed from IRS files and made public pursuant to Section 6103(h)(4), the return information has lost its confidential status, and there is no reason for government officials to continue to be subject to

2. Petitioners mistakenly contend (Pet. 14) that the decision below conflicts with *Rodgers* v. *Hyatt*, 697 F.2d 899 (10th Cir. 1983). In that case counsel for Rodgers had elicited, at a hearing on a petition to enforce an IRS summons, testimony from IRS Agent Hyatt to the effect that there had been allegations that Rodgers was dealing in stolen oil and was not reporting all the income from his oil sales.[4] Subsequently, at a meeting with representatives of another taxpayer, Agent Hyatt made reference to the allegations that Rodgers was rumored to be involved in stealing oil. Rodgers brought a damage action under the predecessor of Section 7431 (26 U.S.C. 7217 (1976)), alleging that this reference violated Section 6103. A jury awarded him the statutory minimum of $1,000 in damages, and the court of appeals affirmed.

The court of appeals rejected the government's contention that the later disclosure of return information that Agent Hyatt had already lawfully disclosed in open court could not violate Section 6103. The court stated that it "need not reach the loss of confidentiality contention advanced by Hyatt" because Agent Hyatt's disclosures "were violative of the provisions of § 6103(k)(6)" (697 F.2d at 904). While the court's opinion could be read broadly to suggest that tax return information can never lose its confidential status, even after it has been made public, the decision addresses a factual context very different from the one here and does not purport to state such a broad rule. On the contrary, the court discussed in detail the cir-

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a restriction on the dissemination of the very return information that already has been publicly disclosed.

[4] These allegations were later repeated in the court of appeals' published opinion affirming the summons enforcement order. *United States* v. *MacKay*, 608 F.2d 830, 832 (10th Cir. 1979).

cumstances under which the disclosure was made and concluded that the agent's actions were "abusive" because he was making no effort to engage in any investigative activity when he made the disclosure. "Under these circumstances," the court concluded, the disclosure must be regarded as violative of Section 6103, regardless of whether the return information had lost its confidentiality. 697 F.2d at 906.

While the precise rationale of *Rodgers* is unclear, it is not apparent that the Tenth Circuit, even if it found *Rodgers* to have some applicability beyond its unusual context of an "abusive" disclosure made under circumstances completely disconnected from the judicial proceedings in which the lawful disclosure had been made, would find a violation of Section 6103 in circumstances similar to those in this case. The issuance of a government press release that reports information concerning tax law enforcement actions that have been publicly disclosed in contemporaneous court proceedings serves an important public interest and bears little resemblance to the type of disclosure for which liability was found in *Rodgers*. Accordingly, although we believe that *Rodgers* was wrongly decided, there is no direct conflict between that case and the decision below, and there is no need for further review here.[5]

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[5] Petitioners claim (Pet. 15-17) that the decision below conflicts with several district court cases. Two of the decisions cited by petitioners—*Malis* v. *United States*, 87-1 U.S.T.C. ¶ 9212 (C.D. Cal. 1986), and *Husby* v. *United States*, 672 F. Supp. 442 (N.D. Cal. 1987)—did not involve press releases, and in any event are decisions by courts within the Ninth Circuit. There has not yet been a final judgment entered in *Johnson* v. *Sawyer*, 640 F. Supp. 1126 (S.D. Tex. 1986), which does involve a press release, but one in which not all of the information in the press release had been disclosed in the public court record. Petitioners correctly note (Pet. 17) that the district court in *Thomas* v. *United States*, *supra*, reached the same conclusion as the

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MARCH 1989

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court of appeals here in a press release case. *Thomas* is pending on appeal in the Seventh Circuit, No. 88-1336.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00174